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No. 96-143

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

VILLAGE OF WESTHAVEN, JAMES P. O'BRIEN, LORIN SCHAB, JAMES GRAVES, JAMES SURDYK, WILLIAM RULIEN, VILLAGE OF ORLAND PARK, ORLAND SCHOOL DISTRICT NO. 135, ORLAND FIRE PROTECTION DISTRICT, JOHN ARENZ, PATRICK BURKE, ERIC CONORS, JOAN FIRSK, BARRY JONES, CHARLES KIDD, DANIEL MAJEWSKI, ROD OHLROGGE, MERRILL SINGLETERRY, CHARLES THOMPSON and GREGORY WACHOWIAK,

Petitioners,

vs.

J. FRED CREEK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent J. Fred Creek requests that the Court deny the petition for writ of certiorari which seeks review of an opinion and judgment of the United States Court of Appeals for the Seventh Circuit. The court of appeals opinion is reported at 80 F.3d 186 (7th Cir. 1996), petition for rehearing denied. For the convenience of the Court, all citations to the opinion will be to the opinion included in the Appendix of the petition at pages 1 through 13 and to the official reporter.

STATEMENT OF THE CASE

A. Facts

In the late 1970s and early 1980s, respondent J. Fred Creek was a real estate developer. In January 1980, Mr. Creek obtained the right to develop Pheasant Ridge and Hunter Apartments, adjacent apartment complexes, in the Village of Westhaven (now Orland Hills), Illinois. At the time, Westhaven had virtually an all white population, as did neighboring Village of Orland Park, another petitioner. Westhaven and Orland Park are in the southwest suburbs of Chicago, located in Cook County, Illinois. The court of appeals opinion succinctly identifies the fulcrum of the dispute.

> Creek needed a permit from the Village in order to proceed. All was going swimmingly—the Village was eager for the development—until January 9, 1979, when the Village learned that Creek was asking the U.S. Department of Housing and Urban Development for federal rent support for 40 percent of the units. Creek contends—we must assume for purposes of this appeal correctly—that the Village, knowing that rent support would make the development

> attractive to black people and wishing to keep Westhaven white, determined to prevent Creek from going forward with the development. So it denied him the permit on pretextual grounds.

(App. at 2; 80 F.3d at 188).

In August 1979, Creek's predecessor in interest filed a lawsuit in the Circuit Court of Cook County, Illinois to establish its right to build the apartments. In April 1980, the Circuit Court decreed that the developer had a clear legal right to build the apartments and enjoined Westhaven from withholding the building permit and from otherwise interfering with the construction of the apartments. When Westhaven did not comply, Creek returned to the Circuit Court, which, in August 1980, entered a consent order to the same effect as the April 1980 order. However, Westhaven still refused to issue the building permit.[1]

Instead, Westhaven and the other petitioners continued and expanded the breadth of their conspiracy to stop the apartments from being built.[2] Together, they began a fervent letter-writing campaign to solicit other government support to block Pheasant Ridge and Hunter Apartments. The Seventh Circuit described

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1. A total of five similar orders were entered. Finally, on May 17, 1992, the Circuit Court of Cook County ruled that its order shall be and serve as a Conditional Building Permit.

2. The entire scope of the conspiracy is much broader than petitioners describe. In fact, the conspiracy began in 1979. Among other things, the conspiracy involved refusal to issue the necessary building permits, placing improper conditions upon issuance of the permits, and filing a frivolous lawsuit against the Department of Housing and Urban Development to prevent the Section 8 financing from proceeding.

this campaign as "a far-reaching, concerted effort to enlist the efforts of state and federal officials to prevent Creek from building a rent-supported apartment complex in Westhaven." (App. at 2; 80 F.3d at 189).

This far-reaching, concerted effort is the part of the conspiracy at issue in the petition. The petitioners argue that the First Amendment provides a safe haven for their conspiracy to deprive Mr. Creek of his civil rights. The court of appeals did not pass on the question. (App. at 9, 11; 80 F.3d at 192, 193).

B. Course of Proceedings and Disposition of the Case Below

This lawsuit was filed to recover damages caused by individual and collective acts of racial discrimination by respondents to prevent a Section 8 apartment complex from being built in their community. Respondent asserts theories of recovery under 42 U.S.C. §§ 1981, 1982, 1985(3), and 1986; the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*; the constitutional guarantees of equal protection and substantive due process; intentional interference with prospective business advantage; intentional interference with existing contractual relationship; breach of contract; and negligence.

The case originally was filed in the Circuit Court of Cook County, Illinois on November 10, 1982. After nearly 14 years of litigation, there has been no trial. A date for trial presently is set for December 2, 1996.

The case was removed to the Federal District Court for the Northern District of Illinois on March 16, 1983. Plaintiffs in the originally filed complaint were J. Fred Creek and Terracom Development Group, Inc. An intervening complaint was filed on November 21, 1983 by Shell Development Corporation, which has since settled its dispute.

As the case approached its last trial date of January 3, 1994, J. Fred Creek was the only plaintiff remaining. The remaining defendants were: the Village of Westhaven and a number of individual village trustees; the Village of Orland Park; Orland School District No. 135; and the Orland Fire Protection District. Each of these defendants is a petitioner.

Shortly before the case was to be tried in January 1994, the district court invited summary judgment motions by defendants. On January 24, 1995, the District Court granted those motions and dismissed the case. After reiterating previous rulings that respondent had sufficient evidence of racial animus and conspiracy, the district court dismissed the lawsuit on the basis that the entire case was *res judicata* because of related litigation respondent's predecessor-in-interest prosecuted in 1979.

Respondent appealed the dismissal, which the Court of Appeals for the Seventh Circuit reversed and remanded. The ruling by the Court of Appeals focused exclusively on *res judicata* and the nature of respondent's damages claims. Petitioners argued numerous grounds to support the judgment, most of which were characterized by the Court of Appeals as being meritless. The Court of Appeals specifically declined to decide whether the lobbying aspect of the conspiracy was privileged. (*Id.*). The very same issues raised in the present petition also were raised in petitioners' request for rehearing in the Court of Appeals, which was denied. (App. at 14).

REASONS FOR DENYING THE WRIT

The writ should be denied for the following reasons: *First*, none of the issues raised in the petition were passed upon by the Court of Appeals. Petitioners have not provided a rationale to support the notion that this case presents an important question of federal law which has not been, but should be, settled by this

Court. Sup. Ct. R. 10(c). The petition amounts to no more than contentiousness over *dicta* by the Court of Appeals. *Second,* the Court of Appeals opinion does not cause a conflict with any other circuit. In fact, the opinion acknowledges and is in keeping with the law in other circuits that have ruled on the question.

I.

THIS COURT DOES NOT RULE ON CLAIMS THAT WERE NOT RULED UPON IN THE COURT BELOW. NEITHER THE PRIVILEGE NOR THE WAIVER ARGUMENTS WERE RULED UPON IN THE COURT OF APPEALS, AND THERE IS NO REASON TO DEVIATE FROM THIS STANDARD.

There are two legal issues set forth in the petition.

(1) Whether the First Amendment provides immunity for the government defendants for their conspiracy to deprive respondent of his civil rights;

(2) Whether petitioner, Orland School District No. 135, waived any First Amendment right it may have had by contracting to refrain from "tak[ing] action, legal or otherwise, to oppose, or to attempt to oppose, the proposed development. . . ."

Both of these arguments were among many petitioners presented to the Court of Appeals as bases for upholding the judgment in the District Court. The Court of Appeals, which characterized the former as "[t]he only ground that has any possible merit. . . ." (App. at 8-9; 80 F.3d at 192), found it unnecessary to decide the question. "We need not decide whether the lobbying, the 'letter-writing campaign,' was privileged. . . ." (App. at 9; 80 F.3d at 192).

This Court generally does "not address arguments that were not the basis for the decision below." *Matsushita Electric Industrial Co., Ltd. v. Epstein*, __ U.S. __, 116 S.Ct. 873, 880 n.5 (1996). *See Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 245, 105 S.Ct. 1245, 1257 (1985) (". . . [T]he Court of Appeals did not rule on this claim, and we likewise decline to do so.") Since the Court of Appeals did not decide the question, its discussion concerning First Amendment immunity for the government defendants is *dicta*. And while petitioners may take exception to that *dicta*, ". . . it bears repetition that this Court 'reviews judgments, not opinions.' " *Bowen v. American Hospital Association*, 476 U.S. 610, 625 n. 11, 106 S.Ct. 2101, 2112 n. 11 (1986), citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984).

The petitioners have not provided a reason for the Court to deviate from these guidelines. They make no credible argument that their petition presents an important question of federal law that has not been settled. *See* Supreme Court Rule 10(c). Nor do they argue that the Court of Appeals decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for the exercise of this Court's supervisory power." Sup. Ct. Rule 10(a).

In this respect, petitioners do not even address the seminal point clearly made by the Court of Appeals: All federal courts that have ruled on the question have held that municipalities do not have First Amendment rights.

> Only a few cases address the question whether municipalities or other state subdivisions or agencies have any first Amendment rights. All but one, and that not a case against a municipality, answer "no."

Columbia Broadcasting System, Inc. v. Democratic National Comm., 412 U.S. 94, 139 (1973) (concurring opinion); *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990); *Student Government Ass'n v. Board of Trustees*, 868 F.2d 473, 481 (1st Cir. 1989); see also *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir. 1989). Contra, *Nadel v. Regents Of University of California*, 34 Cal. Rptr. 2d 188, 197-98 (Cal. App. 1994).

The Court of Appeals did nothing at odds with the prevailing weight of authority. The Seventh Circuit would have been out of step only had it ruled as petitioners suggest.

After 14 years of waiting and fighting, petitioner should finally be allowed his day in court before a jury. There is no need to delay trial any longer. The writ should be denied.

II.

THERE IS NO CONFLICT BETWEEN THE SIXTH AND SEVENTH CIRCUITS.

The petitioners have always argued that their conspiracy to prevent black people from moving into their community was protected petitioning activity. These governmental entities argue that they are allowed to exert political pressure on other agencies of the government to do what the civil rights laws prevent them from doing themselves.

Petitioners raised these same First Amendment arguments

in the District Court at least three times. With one exception, they lost each motion. (App. 21-30; 46-47; 67-72). The exception was a partial summary judgment granted to Orland Fire Protection District on the basis that it was more private than governmental. (App. 47; App. 63-66).

Straining to find a basis for a writ, petitioners have conjured a conflict between the Court of Appeals ruling and a 16 year old case from the Sixth Circuit. The issue in *United States v. Peraino*, 645 F.2d 548 (6th Cir. 1981), *cert. denied*, 454 U.S. 1046, 102 S. Ct. 586, was whether defendants, who had been tried and convicted of conspiracy to violate the federal obscenity laws, were properly made to stand trial in the venue to which the obscene materials were transported. The substantive First Amendment issue, which the jury answered in the positive, was whether the film in question violated the local community standard for obscenity.

Defendants in *Peraino* had not acted in concert with their coconspirators until after the obscene film had been shown in the subject jurisdiction. "There was evidence he [defendant] did not intend to distribute the film in communities where it would offend or cause legal problems . . . There was no evidence that the community standards of any community to which they did transport the movie were violated." *Id.* at 550. The court reversed defendants' convictions because they should not have been subjected to prosecution in that venue. The court stated:

> Merely joining the conspirators in their efforts in other communities after the film was no longer being shown in Memphis does not evidence intent to further or advance the illegal purpose of the conspiracy to ship the film into Memphis. Absent any evidence of adherence to the criminal purposes of the

> conspiracy, defendants . . . cannot be held to have become members of the conspiracy.

Id.

Peraino turned on an analysis of defendants' intent, which was derived from evidence adduced at trial. This case has not yet been tried, so the same kind of analysis cannot be made. However, it is notable that the district court consistently denied motions by petitioners every time they asked for judgment based on a claimed lack of intent on their parts. (App. 49-51; App. 114-117). The Court of Appeals relegated those arguments to those without merit.

Further, the First Amendment issue in *Peraino* centered on whether the film violated local standards. The court distinguished the case from the more typical circumstance, and the one present in this case, where a national standard of conduct is at issue. *Id.* at 551. Unlike the facts in *Peraino*, the conspiracy in this case involves "a far-reaching, concerted effort to enlist the efforts of state a federal officials to prevent Creek from building a rent-supported apartment complex. . . ." (App. at 2; 80 F.3d at 189).

There is no conflict between the Sixth and the Seventh Circuits here. The question in *Peraino* was whether defendants could be convicted of violating obscenity statutes where the evidence at trial showed that they had done nothing in furtherance of the criminal conspiracy. The question in this case is whether petitioners violated respondent's civil rights, because, "Even if municipalities do have First Amendment rights . . . we do not think they have the right to foment, whether through speech or otherwise, governmental discrimination on grounds of race." (App at 11; 80 F.3d at 193).

The distinction is important because respondent should at least be given the opportunity to show at trial that petitioners did in fact foment governmental discrimination on the grounds of race. *See United States v. Whitehorn*, 710 F. Supp. 803, 818 (D.D.C. 1989), where the court rejected a First Amendment *Peraino* defense because defendants' actions "do not constitute protected expression, and they are illegal in every community."

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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